

# EMPLOYER DO'S AND DON'TS

Workers' Comp 101  
& Best Practices

Michael L. Haynie



Building a Better Tomorrow

# Employer Do's & Don'ts

# Do: Report the claim!

- The Bureau of Workers' Compensation requires the employer to report the injury to the insurer or TPA.
- The claim must be reported within one working day of receiving notice of the injury.
- Other deadlines are triggered when the employer knows about an injury.
  - First Report of Injury must be filed.
  - A panel of doctors must be provided.
  - Medical benefits are due.
  - Temporary disability benefits may be due.
  - A decision on compensability must be made within 15 days of notice of the injury.

## Don't: Conceal the claim or shift liability!

- Do not directly pay benefits to conceal the injury or extent of benefits.
- Knowingly, willfully, and intentionally causing a medical or wage loss claim to be paid under health or sickness and accident insurance may result in:
  - A penalty; and
  - Loss of offset.
- This includes failing to provide reasonable and necessary medical treatment.
- What offset?
  - Employer may set off from temporary and permanent disability benefits any payments made to an employee under an employer funded disability plan.

# Do: Provide a panel!

- A panel must be provided within three business days of receipt of notice of an injury and the employee expressing a need for medical care.
- Providing a panel is not an admission of liability.
- Consequences of failing to provide a panel:
  - The Bureau may impose a penalty – the Bureau will ask for a copy.
  - May be liable for unauthorized treatment.
- Benefits of providing a panel:
  - Control over the medical treatment.
  - The doctor's opinions on causation and impairment are presumed to be correct.

# Don't: Provide a bad panel!

- A list of three or more independent reputable physicians in the employee's community.
- Physicians must be qualified, willing, and able to treat in a timely manner the reported injury.
- Urgent care clinics acceptable if staffed by at least one physician.
- Onsite or in-house medical clinic is not a substitute for a panel. The clinic may be included on the panel if it meets the statutory criteria.
- Must be on a form created by the Bureau.
- The employee should indicate the selection on and sign the form.
  - Exception: If the employee voluntarily seeks treatment with a physician on the panel, then that physician becomes the selected physician even if the employee does not sign the form.
- The employer must give a copy to the employee and maintain a copy in the employer's records.

# Don't: Assume the employee is not injured.

- Injury: An injury by accident, arising primarily out of and in the course and scope of employment.
- Arising primarily out of: medical causation.
  - Medical causation is determined by the doctor.
  - “Primarily” means that the employment contributed more than 50% in causing the injury, considering all causes.
- Course and scope: injury occurs while the employee is performing a duty the employee was employed to perform.
- Can be gradual or acute.
- Aggravation of a pre-existing condition may be compensable.

# Don't: Assume W9 = independent contractor

- Calling a worker an independent contractor does negate a worker's eligibility for workers' compensation benefits.
- Employee v. independent contractor test:
  - The right to control the conduct of the work;
  - The right of termination;
  - The method of payment;
  - The freedom to select and hire helpers;
  - The furnishing of tools and equipment;
  - Self-scheduling of working hours; and
  - Freedom to offer service to other entities.
- Consideration: Is the employment at the time of injury "casual"?
  - "Casual" employee: Person employed for the purpose of engaging in activity that is not in the usual course of business of the employer.



# Do: Cooperate with the adjuster!

- The Bureau's rules require that the insurer contact the employer within two working days of notice of an accident.
- Required information:
  - Wage statement: gross earnings during the 52 weeks immediately preceding date of injury.
  - Job description: assists with medical causation and return to work issues.
  - Prior claims or injuries: assists with medical causation .
  - Witnesses

# Don't: Ignore the ombudsman!

- Refusal to cooperate with the services provided by the ombudsman may result in a penalty!
- Ombudsman program provides valuable information and resources that can prevent or defuse problems early in a claim.

# Do: Avoid penalties!

- The workers' compensation law provides that the following may result in a penalty:
  - Failing to file a First Report of Injury timely;
  - Failing to provide a proper panel timely;
  - Bad faith denial of a claim;
  - Failing to provide medical treatment timely;
  - Failing to pay temporary disability benefits timely; and
  - Failing to cooperate with the ombudsman;

# Don't: Ignore safety rules!



© Pleated Jeans

# Safety violations

- An employee who is injured while violating a safety rule or failing to use a safety device may not be entitled to workers' compensation benefits.
- Elements of a safety violation defense:
  - The violation must be the cause of the accident or injury;
  - The employee has actual knowledge of the safety rule;
  - The employee understands the danger involved in violating the rule;
  - The employer consistently enforces the rule; and
  - The employee lacks a valid excuse for violating the rule.

# Do: Become a CERTIFIED drug-free workplace!

- An injury due to the employee's intoxication or illegal drug usage is not compensable.
- Benefits of being a certified drug-free workplace:
  - Positive alcohol / drug test results in presumption that the drug or alcohol was the proximate cause of the injury.
    - Exception: If, before the accident, the employer had actual knowledge of and acquiesced in the employee's presence at the workplace while under the influence.
  - Discount on insurance premium.

# Do: Return the employee to work!

- Terminates temporary disability benefits.
- Significantly limits permanent disability benefits.
  - Return to work: Permanent disability award limited to one times the impairment rating.
  - No return to work: Employee may receive permanent partial disability benefits based on up to 3.0537 times the impairment rating. In certain cases, the employee may receive up to 275 weeks of benefits or benefits until the employee is eligible for full retirement.
- Example: 50 year old employee with a 10% rating, a \$500 comp rate, no HS or GED, living in a high unemployment county.
  - Return to work: \$22,500.00
  - No return to work: \$68,708.25; \$137,500.00; or \$442,000.00

# Exceptions

- The loss of employment occurs after the initial compensation period is over.
  - Initial compensation period begins on date of MMI and continues for the same number of weeks based on the impairment rating times 450 weeks.
    - $450 \text{ weeks} \times 10\% = 45 \text{ weeks}$ .
    - Date is included in the settlement agreement.
- The employee obtains employment with another employer at the same wage or salary before the expiration of the initial compensation period.
- Loss of employment is due to misconduct.
- Loss of employment due to employee's voluntary resignation or retirement, so long as it did not result from the injury.



# Do: Recommend vocational rehabilitation!





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# Questions?

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# Thank you



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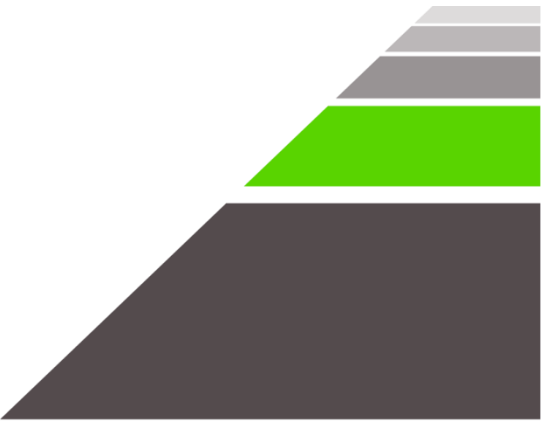
# Next Step Program

Don't Stop  
Thinking About  
Tomorrow

Brian Holmes



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# Next Step

Program

# Difficult Questions

How much wood would a woodchuck chuck if a woodchuck could chuck wood?



# Difficult Questions

If Peter Piper picked a peck of pickled peppers, where is the peck of pickled peppers Peter Piper picked?





# Difficult Questions

*What am I supposed to do now?*

# Better Answer

- Connect permanently disabled injured workers with public institutions and monetary resources to acquire the knowledge, skills and abilities they need to return to meaningful employment.

# Answer

**Back to School,  
Back to Work**



# What

- Money for use at TN Public School
- TCAT
- 2 year
- 4 year
- \$5,000 per fiscal year
- \$20,000 per lifetime

# What

- Assistance with
  - Likes
  - Skills
  - Understanding opportunities
    - Education
    - Training
    - Available jobs
- Connect with other sources to cover costs
- TNReconnect
- Fed Government
  - Title Funding
  - Disability
  - Veteran

# Who

- TN Bureau of Workers' Compensation
- Fund Allocation Committee
- Next Step Program
- Injured Workers
- Subsequent Injury Fund
- Labor and Workforce Development

# Injured Workers' Qualification

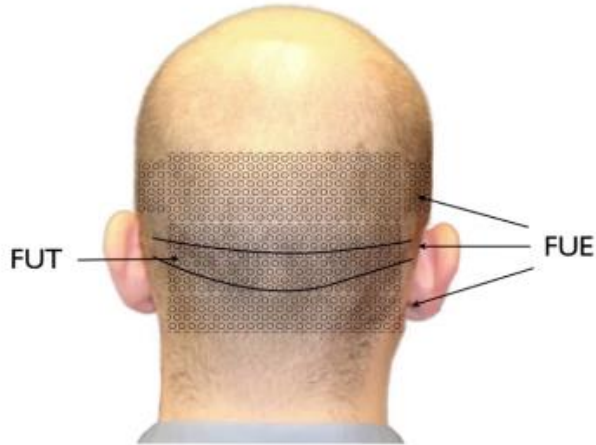
- Compensable WC Claim
- Injured between 7/1/18 and 6/30/21
- Did not return to work
- Permanent injuries
- Good candidates



# Good candidates for hair transplant

Hair Loss FAQs

**Who Makes  
a Good Hair  
Transplant  
Candidate?**





# Good candidates for vocational recovery

1. Understand and Follow Instructions
2. Training Aligns with Abilities
3. Occupational Demand
4. Ability to Engage Training

# Fund Allocation Committee



"IF AT FIRST YOU DON'T SUCCEED, APPOINT A COMMITTEE AND LET THEM WORRY ABOUT IT."

# Fund Allocation Committee

- The Administrator shall appoint a Fund Allocation Committee comprised of: representatives of employees, employers, and the medical and/or vocational rehabilitation communities with knowledge of job opportunities, ability or vocational assessment, or employment training; to assist and advise the administrator regarding the selection of fund recipients and the allocation of funds.

# Fund Allocation Committee

In advising the Administrator, the committee members shall consider the applicant's eligibility and likelihood of successful matriculation.

# Key Dates in History

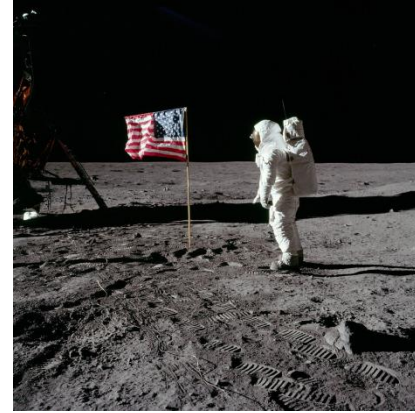
- July 4, 1776



- January 1, 1863



- July 20, 1969



- September 24, 1979

Happy  
Birthday!

# Key Dates

- Injuries after 7/1/18 and before 6/30/2021
- Within 90 days after receiving Resulting award payment
- Re-apply within 60 days prior to end of fiscal year

# How

- Apply
- Consult
- AJC
- Committee
- Enroll
- Attend
- Graduate
- Work

## Roles within the Bureau

- Mediator
- Ombudsman
- Judge
- Administrative Staff

# Rules Promulgation - 0800-02-27-.06 PROGRAM ASSISTANCE

1. Educating interested parties about the Program, including how to navigate the application process;
2. Assisting applicants with accessing resources to define their knowledge, skills, abilities, and interests;
3. Informing interested parties about educational opportunities;
4. Assisting with enrollment in eligible educational institutions;
5. Identifying potential problems or obstacles with obtaining or maintaining eligibility
6. Assisting with discovering and implementing solutions to overcome common obstacles and
7. Reporting outcomes



# Why should you help?

- Lower long term health costs for claims with open medical benefits.
- Use training to bring experienced employees back to work.
- Improve WC System
- Reduce reliance on SSDI
- Show employees you care.

# What you can do

- Educate
- Advocate
- Assist





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# Questions?

# Thank you



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# Let's Be Ombuddies:

## Getting to Know Your Ombudsman Attorney

Jay Hicks



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# Agenda

- Who is eligible for Ombudsman Attorney services?
- Where did the authority for creating the Ombudsman Attorney position come from?
- What ethical considerations must the Ombudsman Attorney be aware of and what services can the Ombudsman Attorney provide?
- What has the Ombudsman Attorney accomplished so far?
- How do you refer people to the Ombudsman Program?

# Who is eligible for Ombudsman Attorney services?

- Eligibility Criteria:
  - 1) Not represented by an attorney; **AND**
  - 2) Date of Injury occurred on or after July 1, 2016
- Generally, ombudsman attorney involvement with a claim begins after mediation has taken place.

# Statutory Authority

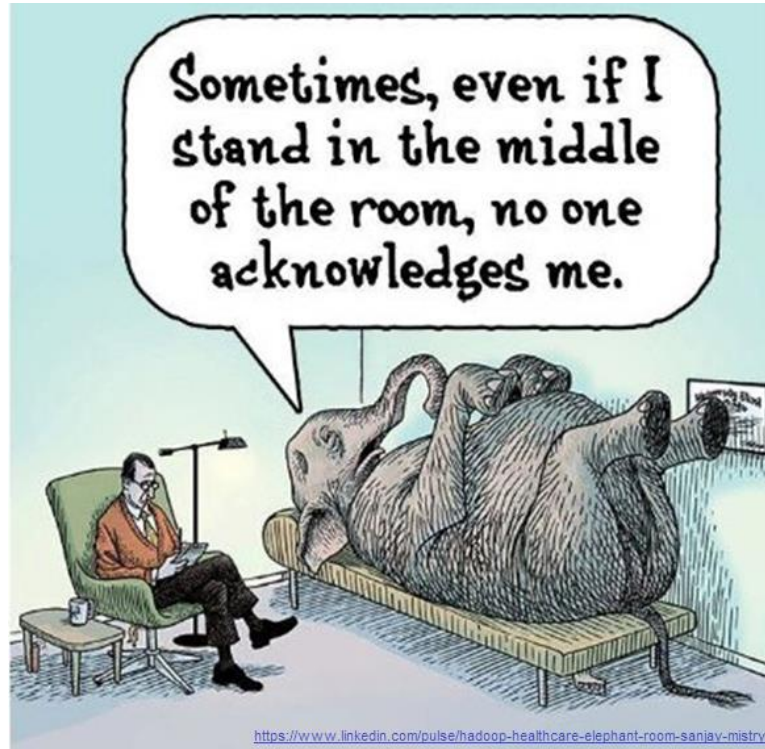
- Tenn. Code Ann. 50-6-216(e)(3)
  - Originally: “An ombudsman shall not provide legal advice.”

**BORING**



# Statutory Authority

- Tenn. Code Ann. 50-6-216(e)(3)
  - Originally: “An ombudsman shall not provide legal advice.”
  - Now: “An ombudsman who is not a licensed attorney shall not provide legal advice; however, an ombudsman who is a **licensed attorney** may provide **limited legal advice** but **shall not represent any party** as the party’s attorney. No ombudsman shall make attorney referrals.”



# Tough Ethical Questions

- Attorney-client relationship formed?
- If so, is it possible to provide effective representation?
- What is “limited legal advice”?

# Formal Ethics Opinion 2017-F-162

- If an ombudsman attorney provides “limited legal advice”, is an attorney-client relationship created between the ombudsman attorney and party to whom advice is given?
- **Answer:** No. TRPC, Rule 1.2(c) states that “[a] lawyer may limit the scope of a client’s representation if the limitation is reasonable under the circumstances and the client gives consent, preferably in writing, after consultation.”

# Formal Ethics Opinion 2017-F-162

Filed Date Stamp Here



## CERTIFICATE OF NON-REPRESENTATION (CNR)

Tennessee Bureau of Workers' Compensation

[www.tn.gov/workforce/section/injuries-at-work](http://www.tn.gov/workforce/section/injuries-at-work)

wc.ombudsman@tn.gov

1-800-332-2667

**Applies to injuries on or after July 1, 2016**

State File Number: \_\_\_\_\_ Docket Number: \_\_\_\_\_

Telephone Number: \_\_\_\_\_ Email: \_\_\_\_\_

I, \_\_\_\_\_, am requesting the assistance of an ombudsman attorney. I am not represented by an attorney for my workers' compensation claim. I know I have the right to obtain an attorney at any time. If I hire an attorney, I know that my attorney must immediately contact the Bureau and terminate the ombudsman attorney's services. I am also aware that I may conclude this assistance at any time by notifying the Bureau or informing the ombudsman attorney.

### **Nature of the Ombudsman Attorney Service**

I understand Tennessee law permits the ombudsman attorney to provide limited legal advice without providing legal representation. I understand the ombudsman attorney **is not my attorney** and will not make arguments, submit evidence, or present my case to a court for me.

I understand an ombudsman attorney is an employee of the state of Tennessee and the Bureau of Workers' Compensation. The ombudsman attorney may provide information regarding my rights and responsibilities, explain the process for resolving my claim, and discuss court procedures consistent with the attached guidelines.

# Formal Ethics Opinion 2017-F-162

- What is “limited legal advice”?



# What is “limited legal advice”?

- Undefined
- Board of Professional Responsibility has provided us an illustrative list of dos and don'ts in its Formal Ethics Opinion.

# Ombudsman Attorney Dos

- Explain basic legal principles
- Explain procedures
- Explain the elements of the employee's cause of action
- Explain importance of medical proof
- Provide applicable rules, statutes, and case law as they apply to general principles of workers' compensation
- Evaluate the claim and explain the strengths and weaknesses of the case to the pro se litigant



# Ombudsman Attorney Don'ts

- Court appearances with or on behalf of any person or entity (no deposition, mediation or settlement conference appearances either)
- Drafting documents or correspondence for or on behalf of any person or entity
- Filing documents with trial court or on appeal
- Critique written materials or oral presentations prior to submission
- Communication prohibitions\*

# Enough elephants for one day...

- Go Vols!



# Claimant Overview

- 45 claimants have applied for services as of 5/17/18
  - 1/3 of these since March 2018
- 19 of these 45 have reached a conclusion
  - 11 cases reached settlement
  - 3 claimants were able to find representation
  - 5 decided not pursue their claims
- 7 Expedited Hearings
  - 3 claimants awarded benefits
- 2 claimants have successfully defended MSJs

# Referrals

Have your employee call the Ombudsman line at

1 (800) 332-2667



# Contact Information

- **James “Jay” Hicks** | Ombudsman Attorney
- Tennessee Bureau of Workers' Compensation
- Mediation & Ombudsman Services of TN (MOST)
- 220 French Landing Drive, Nashville, TN 37243
- Phone: 615-741-5173
- E-mail: [James.Hicks@tn.gov](mailto:James.Hicks@tn.gov)



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# Questions?

# Thank you



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# 2018 Education Conference

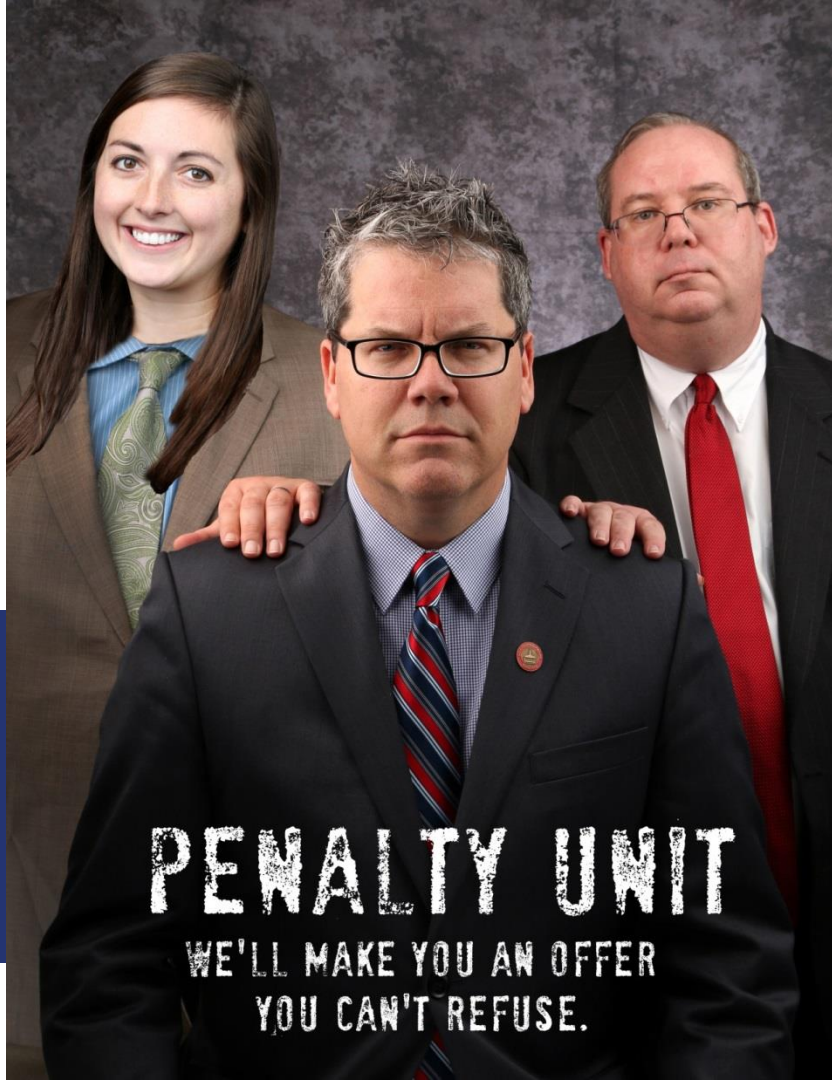
## Penalty Update

By: Madeline Shelly



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**THIS is who you  
don't want to get a  
letter from:**

# Purpose of the Penalty Unit

- The purpose of the Penalty Unit is to ensure timely compliance with the TN Workers' Compensation Law and Bureau rules by all persons and entities involved in a TN workers' compensation claim.
- In this way, the Penalty Unit works in conjunction with all other programs within the TN Bureau of Workers' Compensation.

# THE PROCESS

- The Penalty Program sends out a Notice of Potential Penalty.
- The Notice of Potential Penalty gives the alleged violator(s) seven (7) calendar days to provide facts, information, and documentation concerning why a civil monetary penalty should not be assessed.
- The Penalty Program reviews all information provided and determines whether such information resolves the issues surrounding the alleged violation or whether a civil monetary penalty should be assessed, and if so, how much such monetary penalty should be.

# THE DETERMINATION and APPEAL

- If the Bureau determines that a civil monetary penalty should be assessed, the Penalty Program issues an Agency Decision, and the alleged violator(s) has/have fifteen (15) calendar days to request a contested case hearing with the Bureau under the Uniform Administrative Procedures Act, if the matter is not resolved or settled, or if the civil monetary penalty amount is paid.
- If a contested case hearing is timely requested, the requesting party shall have the burden of proving, by a preponderance of the evidence, that the penalized party was either not subject to the TN Workers' Compensation Law, or that the penalties assessed should not have been assessed. T.C.A. §50-6-118(c).

# What are the three most common penalties?

1. Failure by employer to report a claim to the insurance carrier within 1 business day of report of an injury
  2. Failure to File the First Report of Injury (C-20)
  3. Failure to offer a Panel of Physicians (C-42) timely
- *NOTE: Be careful to follow Court of WC Claims Scheduling Orders!*

# Most Common Penalties: Utilization Review

- Failure to timely file for Utilization Review
- Failure to notify the employee and the authorized treating physician
- Failure to provide documents upon request
- Usage of a non-licensed or incorrect specialist to conduct a UR
- Range of \$100-\$1000 for each violation

# How does the Penalty Unit get involved?

- A mediator or judge or ombudsman refers the matter.
- An order mentions a possible violation.
- All files are reviewed for failure to file the C-20.
- Compliance is reviewed on all orders issued.
- Court of WC Claims can issue 25% TTD penalty directly (TCA §50-6-205).

# Question 1:

- Under current rules, how long does employer have to provide a panel of physicians to an employee from the date the employer receives notice of work injury?
  - No later than three (3) business days after receipt of notice of injury and employee expressing a need for medical care, an employee must be provided a panel of physicians as prescribed in T.C.A. § 50-6-204.
  - New Rule effective 5/31/18



## Question 2:

- Do I have to notify the bureau's compliance program with proof of compliance with a Utilization Review Order, or just on compliance with a Court of WC Claims Order?
  - Both
  - There is a penalty for non-compliance:
    - Workers' Compensation Specialist's Order-pre 7/1/14 Date of Injury (\$10K)
    - Order-post 7/1/14 Date of Injury (\$50-\$5000)

# QUESTION 3:

- Can I be penalized (in a compensable claim) if I do not offer the ATP's rating at the mediation?
  - Possibly.
  - Failure to attend, negotiate in good faith, or provide a person with adequate authority to settle at a mediation is a potential penalty for post-reform dates of injury.

# Question 4:

- Which are OK for a case manager to do?
  - a) Developing a treatment plan to provide appropriate medical services to an injured or disabled employee;
  - b) Systematically monitoring the treatment rendered and the medical progress of the injured or disabled employee;
  - c) Assessing whether alternate medical care services are appropriate and delivered in a cost-effective manner based on acceptable medical standards;
  - d) Ensuring that the injured or disabled employee is following the prescribed medical care plan; and
  - e) Formulating a plan for return to work with due regard for the employee's recovery and restrictions and limitations, if any.
- **All of the above!**

# Case Management: “Shalls” and “Shall Nots”

- Helping the adjuster/employer prepare panels is ok
- Delivering the document is ok
- Panel presentation is an employer responsibility  
 (“employer shall designate a panel”-TCA 50-6-204)
- Case Manager should not influence choice of physician

# Case Management – OK

- Compensability-work relatedness?
  - a. Deliver a copy of BWC “suggestions”
  - b. Deliver copy of C20, job description
  - c. Ask ATP: “primarily...course...scope”? **No! (adjuster role)**
- MMI and Rating:
  - a. Try to assist the physician with documents
  - b. Deliver the C30A and communicate dates

# Question 5:

- How many days does an Employer/Carrier have to respond to a Notice of Potential Penalty?
  - Seven (7) calendar days

# Question 6:

- After receipt of an Agency Decision, how many days does an Employer/Insurance Carrier have to request a contested case hearing?
  - Fifteen (15) calendar days

# Question 7:

- What constitutes performing a “reasonable investigation” of the claim before denying or stopping benefits?
  - Case-by-case determination.
  - If counsel was retained by the employer/carrier upon notice and investigation, this is evidence that a reasonable investigation of the claim may have been conducted by the employer/carrier.



# Question 8:

- Which of the following may a Nurse Practitioner or Physician Assistant do:
  - a) may determine medical causation
  - b) may determine the date of an injured employee's maximum medical improvement (MMI)
  - c) may issue a permanent impairment rating
  - d) none of the above
  - e) both A and B

Nurse Practitioners, Physician Assistants (and other mid-level practice extenders under the supervision of a licensed physician accountable to the Board of Medical Examiners) may provide medical treatment ordered by an attending physician to an injured employee in accordance with their licensing.

Only the supervising physician may be listed on an Employee Choice of Physician Form C-42, may determine medical causation regarding the injury, may issue a permanent impairment rating, and may determine the date of an injured employee's maximum medical improvement.

# Medical panels: New Rule

- No later than three (3) business days after receipt of such request, an employee must be provided a panel of physicians as prescribed in T.C.A. § 50-6-204.
- If the employer fails to provide an appropriate initial panel of physicians to the employee within three (3) business days from the date the employer has notice of a work-related injury and the employee expressed a need for medical care, or provides a panel of physicians to the employee that does not meet statutory requirements, the employer may be assessed a civil penalty.

# Medical panels

- Walk-in clinics, urgent care facilities and other similar providers may be an option on a medical panel if the provider is staffed by at least one physician and the name of the staff physician or medical director is also indicated on the panel. Associated walk-in clinics, urgent care facilities and other similar providers may be listed on the same medical panel to the extent allowed by law provided different staff physicians or medical directors are named for each different location.

# Medical panels

- Nurse Practitioners, Physician Assistants and other mid-level practice extenders under the supervision, direction and ultimate responsibility of a licensed physician accountable to the Board of Medical Examiners may provide medical treatment ordered by an attending physician to an injured employee, but only the supervising physician:
  1. may be listed on an Employee Choice of Physician Form
  2. may determine medical causation regarding the injury
  3. may issue a permanent impairment rating, and
  4. may determine the date of an injured employee's maximum medical improvement.

# Medical panels

- Penalty: \$50-\$5,000

**tn.gov/workerscomp**

[wc.info@tn.gov](mailto:wc.info@tn.gov)

[wccompliance.program@tn.gov](mailto:wccompliance.program@tn.gov)

**Questions/Forms?**

# Thank you!



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